STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Donald E. Holbrook, Jr., Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff - Appellant,

v

MARK DREW PERKINS,

Defendant - Appellee.
_____/

Docket No. 120453
Court of Appeals No. 229111
Bay County CC No. 00-001112-FH
Bay County DC No. 99-4349-FY

BRIEF ON APPEAL - - PLAINTIFF-APPELLANT

(Oral Argument Requested)

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STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND INDICATING RELIEF SOUGHT

The People of the State of Michigan are seeking review of portions of the unpublished decision of the court of appeals dated June 8, 2001, (209a - 213a), and the Order denying the People's motion for rehearing dated November 1, 2001. (214a).

The People respectfully request that this Honorable Court reverse that part of the court of appeals opinion found in footnote 1 in which the court states:

> "The prosecution has not raised or argued that the district court erred in dismissing the felony-firearm charge that was related to the CSC I charge. Accordingly, we consider that matter abandoned on appeal. *People v McMiller*, 202 Mich App 82, 83, n 1; 507 NW2d 812 (1993)." (210a).

The People also respectfully request that this Honorable Court reverse that part of the court of appeals opinion that affirms the circuit court's dismissal of a misconduct in office charge and related felony-firearm charge.

STATEMENT OF QUESTIONS INVOLVED

1. WHERE A COUNT OF FELONY-FIREARM WAS DISMISSED AT PRELIMINARY EXAMINATION **ONLY BECAUSE** THE EXAMINING MAGISTRATE FAILED TO BIND-OVER ITS RELATED FELONY (CSC 1ST DEGREE), AND WHERE THE COURT OF APPEALS LATER DETERMINES THAT IT WAS ERROR NOT TO BIND-OVER THE RELATED FELONY COUNT, HAVE THE PEOPLE ABANDONED ON APPEAL THE ISSUE OF THE EXISTENCE OF THE FELONY-FIREARM COUNT BY NOT SPECIFICALLY RAISING IT AS AN ISSUE FOR THE COURT OF APPEALS TO ADDRESS?

   Plaintiff - Appellant answers "NO."

   Defendant - Appellee answers "NO."

2. WHERE THE EXAMINING MAGISTRATE DETERMINED THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT THE COMMON LAW OFFENSE OF MISCONDUCT IN OFFICE WAS COMMITTED BY DEFENDANT, WAS THE COURT OF APPEALS IN ERROR FOR AFFIRMING THE CIRCUIT COURT'S DECISION TO QUASH THE BIND-OVER WHERE THE FACTS SHOWED THAT DEFENDANT, AN **ON-DUTY DEPUTY SHERIFF** WHO WAS IN HIS FULL POLICE UNIFORM, COMMITTED CRIMINAL SEXUAL CONDUCT 1ST DEGREE IN HIS FULLY MARKED PATROL CAR?

   Plaintiff - Appellant answers "YES."

   Defendant - Appellee answers "NO."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Statement of Material Proceedings

Defendant/Appellee was charged with the offenses of *Criminal Sexual Conduct First-Degree*, MCLA 750.520b, *Felony-firearm*, MCLA 750.227b, relating to the CSC 1st charge, *Misconduct in Office*, MCLA 750.505, and *Felony-firearm*, MCLA 750.227b, relating to the Misconduct in Office charge, all occurring on July 4, 1993. A Preliminary Examination was begun on September 15, 1999, during which testimony was taken from the victim, Nicole Fisher. The Preliminary Examination continued on October 8, 1999, during which testimony was taken from Rosemary Jalovaara, a psychologist. Following the completion of the testimony, the Court requested that the parties file written summations following the receipt of transcripts of the testimony. On March 16, 2000, the Court rendered its decision to dismiss the CSC 1st charge and the Felony-firearm charge relating to the CSC 1st charge, and to bind defendant over for trial on the Misconduct in Office and associated Felony-firearm charges.

The People filed a motion to amend the Information in circuit court to add the charges of Criminal Sexual Conduct First Degree and Felony-firearm pursuant to MCR 6.112 (G) and People v Goecke, 457 Mich 442; 579 NW2d 868 (1998). Defendant filed a motion to quash the Information relating to the charges of Misconduct in Office and Felony-Firearm.

In an opinion and order dated July 13, 2000, the circuit court granted defendant's motion to quash the Information, and denied the People's motion to amend the Information. (201a - 209a).

The People filed a timely claim of appeal from the order of the circuit court, and on June 8, 2001, the court of appeals issued an unpublished opinion affirming the circuit court's dismissal of the charge of misconduct in office and the related felony-firearm charge, and remanding the case to the district court for reinstatement of the CSC 1st Degree charge. (211a - 215a) However, in footnote 1 the court of appeals said:

> "The prosecution has not raised or argued that the district court erred in dismissing the felony-firearm charge that was related to the CSC I charge. Accordingly, we consider the matter abandoned on appeal. *People v McMiller*, 202 Mich App 82, 83, n 1; 507 NW2d 812 (1993)." (212a)

The People filed a timely motion for rehearing relating to the court of appeals determination that the dismissal of the felony-firearm charge related to the CSC 1st Degree charge had been abandoned on appeal, and defendant filed a timely motion for rehearing relating to the court of appeals determination that the case should be remanded to district court for reinstatement of the CSC 1st Degree charge.

On November 1, 2001, the court of appeals issued an order denying both the People's motion for rehearing and defendant's motion for rehearing. (216a)

The People filed an Application for Leave to Appeal to the Michigan Supreme Court, as did defendant. Both applications were granted by an Order dated May 7, 2002. (217a).

Statement of Facts

It is the Plaintiff-Appellant's theory that Defendant-Appellee engaged in a course of conduct with the victim, Nicole Fisher (then Nicole Jacobs), beginning when she was 12 years old, that placed her in a state of subjugation so that by the time this offense occurred when she was 16 - almost 17 years old - she did not have the emotional and psychological ability to not engage in sexual conduct with Defendant-Appellee, and that this state of subjugation amounted to coercion under the CSC statute. (MCLA 750.520b).

Defendant was a Deputy Sheriff in Bay County. The particular incident of criminal sexual conduct charged occurred on July 4, 1993. It occurred in the front seat of defendant's marked police patrol car at a time when defendant was in full uniform and was on duty as a deputy sheriff.

Regarding the July 4, 1993, charges: this was the summer before Nicole's senior year in high school. She had gone on a month long student study program to Mexico sponsored by Michigan Lutheran Seminary. While she was in Mexico, the defendant telephoned her twice. During the second telephone call the defendant told her he had something very special for her, and that she should look underneath the bench on her mother's front porch as soon as she got home. (54a - 55a).

When Nicole looked under the bench on her mother's front porch, she found a promise ring. She talked to defendant Perkins on the telephone even though he was on duty, "and we agreed to me at the Industrial Park on my way into church that Sunday. And we met there." (55a). Nicole was 16 years old at the time, and she was able to drive herself to the Industrial Park. The defendant was driving a marked patrol

car. (56a).

"We met at the very end of the alcove. . . . There was a dead end sign down there. . . . I got out of my car and I got into the patrol car. And Mr. Perkins and I talked and I - - . . . . I performed oral sex on him." (56a).

Nicole was asked,

"Q Why - - how is that you happened to perform oral sex on him?

A As I've stated before sex was just something that was expected.

Q Did he indicate to you that he wanted you to perform oral sex on him that day?

A "No he didn't need to.

Q Okay. So does that mean he did not indicate to you that he wanted you to perform oral sex that day or you just did it because it was expected or - - did he make some indication that he wanted sex that day?

A I don't remember him making any indication. He could have.

Q How was he dressed?

A In full uniform.

Q Full sheriff's department uniform?

A Yes.

Q Did he have a gun with him?

A Yes, he did.

Q Did he do anything to try to prevent you from performing oral sex on him that day?

A No.

Q In order to perform oral sex on him that day did he pull his trousers down?

A He unbuckled his stuff, he did not pull them down. He just opened them." (56a - 57a).

Nicole Fisher was then questioned regarding how this whole series of events had affected her emotionally. She stated:

> "This has affected my whole being. . . . It's affected me emotionally tremendously. . . . It has stunted the person I could have become. I was robbed of my childhood innocence. I was not able to function as a normal healthy - - . . . individual." (57a - 58a). . . . . "Sexual abuse, it permeates your whole being. It affects my relationships. It affects how I deal with things. It makes me a very insecure person. It makes me feel full of shame and full of guilt. It makes me feel worthless, used, and disgusting." (60a).

Nicole testified that she has undergone psychological counseling as a result of this series of events. The counseling began in October of 1996 and continues to the present time.

> "There were times when I couldn't function. . . . I couldn't walk around and I was hypersensitive to everything. I couldn't let my husband leave the house without thinking he was doing something. Because Mr. Perkins did the same thing to his wife, why wouldn't my husband do it to me. It affects my relationships with people. My neediness. Or my fear to let somebody inside. It affected me emotionally in school. But, yes, I could have been a much better student I feel. I couldn't concentrate on my athleticism." (60a - 61a).

Nicole testified that she had dreams or nightmares about what occurred, and that she's had countless sleepless nights. She takes medication so that she can sleep at night. It has affected her ability to eat. (62a).

During cross-examination, defense counsel James Hammond attempted to elicit testimony from Nicole that she was not forced or coerced into her relationship with the

defendant. Nicole maintained:

A "He did not physically force me to do it but he had manipulated my mind- - . . . which I was vulnerable to it and at the same time I did not want to say no to him.

Q But he didn't coerce you in any manner, shape, or former though, did he?

A Yes, he did.

Q Well, are we getting into a debate about terms here? Did he- -would it be fair to say maybe he seduced you?

A Yes, that would be fair to say.

Q He led you astray. But I mean, he didn't coerce you or force you to do it?

A He did not force me to do it, no.

Q All right. He didn't brow beat you into doing it?

A No.

Q He didn't use any perceived power that he had over you?

A Yes, he did. I feared- - you have to understand I loved this person like a father figure and I was scared to say no to him.

Q Well, what were you were afraid of?

A I was afraid that if I said no then he would be angry with me.

Q But this was all in your mind?

A This was all in my mind, yes.

Q This was nothing as a result of anything he said or did?

A No.

Q You did it essentially to please him your stating, is that correct?

A Yes.

Q Because of a feeling that you had that you wanted to please him?

A Yes.

Q And you had ambivalent feelings about it, one of which was that you enjoyed it?

A Yes. We're all sexual creatures. We can all be stimulated." (68a - 69a).

Counsel then asked a series of questions designed to establish that the defendant was not in a recognized position of authority over Nicole. Eventually, he asked:

Q Okay. He was never in a recognizable position of authority over you, correct?

A Correct, other than his office as a police officer.

Q Well, do you feel that somehow that because he was a police officer he was in a position of authority over you? Had he ever arrested you?

. . . .

A I feel that a police officer has authority over you, myself, and anyone sitting in this room. And I felt that he had authority over me in the sense that I trusted this man, I put him on a pedestal of my father. And a father has authority over his children. And that's the way I thought of him, whether that be rational, normal thinking that's not for me to decide. But that's how I felt. And, yes, he did have authority over me." (70a - 72a).

Defense counsel cross examined Nicole regarding the July 4, 1993 patrol car incident. As part of the questioning regarding conversations that took place, the following exchange occurred:

Q "Do you know if you told him about the details of your trip to Mexico?

A We talked about Mexico and we also talked about the ring that he had placed under the bench.

Q What, if anything, did you say about that?

A I told him it was beautiful and what he meant - - asked him what he meant by it. And he told me he wanted to marry me.

Q All right. What happened after that?

A I believe I performed oral sex on him." (86a).

After some further cross-examination regarding what Ms. Fisher may have told State Police or Sheriff Department investigators, Mr. Hammond asked:

Q "And then at some point he asked you to perform oral sex on you – – on him?

A It wasn't a question that was asked, it was just something that was expected.

Q How did it come about? Explain how it came about? I don't understand that.

A It just is expected. It's like when we're together that's what happens.

Q All right. When you were together, that was something the two of you would just do?

A Yes.

Q Without him having to say anything to you about it?

A Correct.

Q Something that you voluntarily, willingly would do with him when you were together?

A Yes.

Q Certainly by that time?

A Yes.

Q You don't dispute that certainly by that time you were a person who knew what she wanted to do, correct?

A Correct.

Q Had a will and recognized that you had a free will?

A Yes.

. . . .

Q On that particular date, Mrs. Fisher, did you believe that you were in love with him?

A Yes, I did.

Q And did you think he loved you?

A Yes, I did.

Q And did you want to please him?

A Yes, I did.

Q And was it for that reason?

A Yes." (87a - 89a).

On October 8, 1999, the Preliminary Examination continued.

A stipulation was placed on the record that on Sunday, July the 4th, 1993, the defendant was on duty with the Bay County Sheriff's Department and worked the shift that lasted from approximately 6:00 a.m. until 2:00 p.m. that day. (120a). Additionally, expert testimony was taken from psychologist, Rosemary Jalovaara, to support the People's theory regarding subjugation amounting to coercion under the CSC statute. (121a - 190a).

ARGUMENT

ISSUE 1

WHERE A COUNT OF FELONY-FIREARM WAS DISMISSED AT PRELIMINARY EXAMINATION ONLY BECAUSE THE EXAMINING MAGISTRATE FAILED TO BIND-OVER ITS RELATED FELONY (CSC 1ST DEGREE), AND WHERE THE COURT OF APPEALS LATER DETERMINES THAT IT WAS ERROR NOT TO BIND-OVER THE RELATED FELONY COUNT, HAVE THE PEOPLE ABANDONED ON APPEAL THE ISSUE OF THE EXISTENCE OF THE FELONY-FIREARM COUNT BY NOT SPECIFICALLY RAISING IT AS AN ISSUE FOR THE COURT OF APPEALS TO ADDRESS?

THE STANDARD OF REVIEW FOR A QUESTION OF LAW IS *DE NOVO* REVIEW.

People v Thousand, 465 Mich 149; 631 NW2d 694 (2001).

In its unpublished Opinion of June 8, 2001, the court of appeals noted, in Footnote 1 of the Opinion, that:

> "The prosecution has not raised or argued that the district court erred in dismissing the felony-firearm charge that was related to the CSC I charge. Accordingly, we consider that matter abandoned on appeal. People v McMiller, 202 Mich App 82, 83, n 1; 507 NW2d 812 (1993)." (212a)

Plaintiff-Appellant does agree that the felony-firearm count was never raised as a *separate* issue on appeal. **However we strongly disagree that the issue was abandoned.**

Plaintiff-Appellant's position is that the felony-firearm charge must be considered in conjunction with the criminal sexual conduct charge. The Magistrate made a determination that the criminal sexual conduct charge would not be bound over, and also concluded that the felony-firearm charge would not be bound over. There was nothing regarding the felony-firearm charge in and of itself that the Court felt was inappropriate. The Magistrate's determination dealt extensively with the criminal sexual

conduct charge. (195a - 198a) When the Court determined that it was not going to bind-over the criminal sexual conduct charge, the Court stated the following:

> "In so far as Count 2 is concerned, the felony firearm charge accompanying Count 1, the court is dismissing that matter due to Count 1 being dismissed." (198a)

The issue of the felony-firearm charge was not specifically raised as a separate issue on appeal because there was no question that the reason the examining magistrate failed to bind-over the felony-firearm count was because of his determination not to bind-over Count 1, the criminal sexual conduct 1st degree charge.

However, the issue was raised as part of the argument in Issue 1 in Plaintiff-Appellant's brief in the court of appeals wherein it was stated:

> "Plaintiff-Appellant believes that the District Court Judge erred in failing to bind Defendant-Appellee over for trial on Counts 1 **and 2**, in part because the Judge applied incorrect facts in reaching his decision." (emphasis added) (210a)

In Footnote 1 of the Opinion of June 8, 2001, the court of appeals used as its authority People v McMiller, 202 Mich App 82, 83, n 1; 507 NW 2d 812 (1993). The People believe that McMiller, supra, is not applicable to the case at bar because, as the footnote specifically states, the prosecution on appeal had determined that it was not seeking reinstatement of the two charges of felony-firearm. It was the issue of a CCW charge with unlawful intent that the Court, in McMiller, supra, determined had been abandoned for failure to raise the issue on appeal.

The record is clear as far as the Preliminary Examination is concerned that at the time of the event in question the Defendant was in uniform and had at his disposal, on his person, his weapon. (57a). Case law is quite clear that a defendant does not have

to be using the weapon during the course of a criminal offense as long as the weapon is within his possession and control. The fact that a felon has a firearm at his disposal creates a risk to others. People v Gilbert, 414 Mich 191, 226 n 7; 324 NW2d 834 (1982). In People v Elowe, 85 Mich App 744, 747, 748; 212 NW2d 596 (1978), the Court noted that the language of the statute does not require a nexus between the felony and the firearm. In the situation at bar the rationale for not binding the defendant over on the felony-firearm charge was that the CSC charge was being dismissed. There was no question as to the factual basis for the felony-firearm charge and thus no need to officially argue any issue at the circuit court level or at the court of appeals level.

The relationship between the felony-firearm and the offense to which it is attached is pointed out in People v Stoll, 87 Mich App 595; 275 NW2d 30 (1978). The defendant had pled guilty to assault with intent to commit murder and to possession of a firearm during the commission of a felony. In that case the plaintiff had conceded that there was not a good factual basis elicited to establish the crime of assault with intent to commit murder. The court then stated the following:

> "The firearm offense necessarily turns upon the establishment of the assault offense. As to these two counts, the case is remanded. On remand the prosecutor shall be given the opportunity to establish the missing elements. If he is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed. If contrary evidence is produced, the matter shall be treated as a motion to withdraw the guilty pleas and the court shall decide the matter in the exercise of its discretion." Stoll, supra, 596.

The Stoll case points out the fact that the felony-firearm charge is dependent on the other charged offense, and thus, even though the issue that the court had been dealing

with as to the elements of the assault charge was remanded, it also remanded the felony-firearm charge. The two had to go together. That would be the situation in the case at bar. These two counts have to go together, and the remand in this particular case should also deal with the felony-firearm charge.

Defendant-Appellee is not at all prejudiced with the re-issuance of the felony-firearm charge. There was testimony at the Preliminary Examination initially that defendant had a gun and there was no evidence brought forward to indicate otherwise.

The court of appeals has also indicated on occasion that when a charge has been bound over to circuit court, a felony-firearm charge may be added when it had not been specifically dealt with at the Preliminary Examination stage. In People v Fortson, 202 Mich App 13; 507 NW2d 763 (1993), the trial court had allowed the prosecutor to amend the Information, adding felony-firearm, even though the defendant was never bound over on such a charge. The Fortson court cited the Michigan Supreme Court case of People v Hunt, 442 Mich 359; 501 NW2d 151 (1993), specifically stating that the preliminary examination is not constitutional but statutory. The function of the Preliminary Examination is to determine whether or not there is probable cause and to help satisfy the constitutional requirement that a defendant be informed of the nature of the accusations against him. The Fortson court specifically noted that the Hunt court had determined that the proofs presented at the Preliminary Examination would have supported a bind-over on the charge sought to be added. It reiterated the position that the question that needs to be answered is whether what was requested by the prosecution would have caused unacceptable prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend. Fortson, supra,

15-16. The court, in Fortson, noted that the refusal to remand the case for Preliminary Examination regarding the felony-firearm charge did not result in any unfair surprise, inadequate notice, or insufficient opportunity to defend. Fortson, supra, 17. While this is not the same type of case as Fortson, in that the prosecution is not requesting an opportunity to bring forth something that had not been initially charged in the Complaint, it is similar in that the prosecution is asking that the felony-firearm charge be added to the reinstatement of charges. Certainly, one cannot say that the defendant is being unfairly treated because he knew that the felony-firearm charge was a count that had been initially charged. He had an opportunity to defend, and there is no indication that defense counsel did not have the opportunity to do everything that would be necessary in order to challenge the aspect of the felony-firearm charge as it related to the issue of probable cause.

As noted in Fortson, a trial court may, at any time, amend the indictment in respect to any defect, imperfection, or omission in form or substance or any variance with the evidence. Fortson, supra, 15. In this particular case, Plaintiff-Appellant had indicated in Issue 1 on appeal that the magistrate erred in failing to bind-over to the trial court Counts 1 and 2. (120a). Plaintiff-Appellant obviously feels that Counts 1 and 2 were correct counts and that the error on the part of the magistrate was not related to Count 2, but to Count 1. Plaintiff-Appellant did not go into great detail as to the issue of the felony-firearm, as it was the belief of Plaintiff-Appellant that Count 2 could not stand alone at the Preliminary Exam stage and could not be bound over without Count 1. Plaintiff-Appellant views the lack of a specific issue dealing with the felony-firearm as an omission pursuant to Fortson, supra, that would allow the felony-firearm charge to

be reinstated. It certainly does not affect Defendant-Appellee's rights to include the felony-firearm charge. Defendant-Appellee cannot indicate in any way that he would be unfairly prejudiced by the reinstitution of the felony-firearm charge.

ISSUE 2

WHERE THE EXAMINING MAGISTRATE DETERMINED THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT THE COMMON LAW OFFENSE OF MISCONDUCT IN OFFICE WAS COMMITTED BY DEFENDANT, WAS THE COURT OF APPEALS IN ERROR FOR AFFIRMING THE CIRCUIT COURT'S DECISION TO QUASH THE BIND-OVER WHERE THE FACTS SHOWED THAT DEFENDANT, AN ON-DUTY DEPUTY SHERIFF WHO WAS IN HIS FULL POLICE UNIFORM, COMMITTED CRIMINAL SEXUAL CONDUCT 1ST DEGREE IN HIS FULLY MARKED PATROL CAR?

THE STANDARD OF REVIEW AS TO A CIRCUIT COURT'S DECISION TO GRANT OR DENY A MOTION TO QUASH A FELONY INFORMATION IS DE NOVO TO DETERMINE IF THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING BINDOVER. PEOPLE v NORTHEY, 231 MICH APP 568, 574; 591 NW2d 227 (1998).

Even though the district court did not bind the case over as to the count of criminal sexual conduct and its associated felony-firearm charge, it did bind the case over as to Counts 3 and 4, misconduct in office and felony-firearm. (198a - 200a). However, the circuit court granted Defendant-Appellee's motion to quash these remaining counts. (203a - 207a). Plaintiff-Appellant takes the position that the circuit court made an improper decision and that the decision by the district court was a proper one.

In ruling on the motion to quash, the Circuit Judge stated:

"The same evidence which supported the District Court's finding as to a lack of force or coercion resulting from defendant's police officer status demonstrates that the District Court's bindover of defendant on the charge of official misconduct was an abuse of discretion. The evidence showed that defendant's conduct with the victim on the date charged was unrelated to his police officer occupation or his official duties as a deputy sheriff. Although it occurred while defendant was on duty, it was not in any way a result of or accomplished by defendant's position, powers, or responsibilities as a deputy. As the Supreme Court held in Coutu and Carlin, as the Court of Appeals held in Carlin (On Remand), and as the District Court correctly acknowledged in this case, to be criminally actionable as misconduct in office the charged conduct must arise out of performance or exercise of official duties, or be done under color of the office.

Because defendant's sexual conduct with the victim on the date charged did not arise out of performance or exercise of his official duties as a deputy sheriff, and was not accomplished under color of his office, it did not constitute official misconduct. Considering the facts upon which the District Court acted, there was no justification or excuse for the District Court's ruling, and that ruling must be set aside as an abuse of discretion." (207a)

In People v Coutu, 459 Mich 348, 357-358; 589 NW2d 458 (1999), the Court said:

"We find that the determination whether a deputy sheriff is a public official is dependent upon the legal context in which it arises. Therefore, a deputy sheriff is a public official for purposes of misconduct in office charges when the allegations supporting the charges arise from the performance of that deputy's official duties." (footnotes omitted.)

On remand the court of appeals discussed the charge of misconduct in office:

"The offense of misconduct in office was an indictable offense at common law. "Malfeasance, misfeasance, nonfeasance, misconduct, misbehavior, or misdemeanor in public office is indictable at common-law...." 67 CJS, Officers, § 256, pp 787-788. See also People v Thomas, 438 Mich 448, 460; 475 NW2d 288 (1991) (Boyle, J.). It appears that not only violations of statutory duties are indictable, but also discretionary acts performed with an improper or corrupt motive are subject to indictment. 67 CJS,

Officers, § 256, pp 788-790. Because misconduct in office involving corrupt behavior was indictable at common law, the prosecutor properly charged defendants pursuant to MCL 750.505;MSA 28.773, assuming of course that the conduct charged in this case was not more properly charged pursuant to another statute, i.e. the statute prohibiting the use of prison labor for personal benefit, MCL 801.10(2);MSA 28.1730(2), or the bribery statute, MCL 750.118;MSA 28.313.

The offense itself, misconduct in office, is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." Perkins & Boyce, Criminal Law (3d ed.), p 543. It encompasses malfeasance, which is the doing of a wrongful act, misfeasance, which is the doing of a lawful act in a wrongful manner, and nonfeasance, which is the failure to do an act required by the duties of the office. *Id*, 458, 475 NW2d 288, citing Perkins & Boyce, *supra,* 540. It does not encompass erroneous acts done by officers in good faith or honest mistakes committed by an officer in the discharge of his duties. *Id,* 541.

The term, "misconduct in office" or "official misconduct" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptation does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged. Likewise, misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office, and criminal intent is an essential element of the crime. [67 CJS, Officers, § 256, pp 789-790.]

The crimes for which defendants were charged require a showing of corrupt intent. Perkins & Boyce, *supra,* 541-542.

"Corruption" in this context means a "sense of depravity, perversion or taint." *Id*, 542. "Depravity" is defined as "the state of being depraved" and "depraved" is defined as "morally corrupt or perverted." Random House Webster's College Dictionary (1997). "Perversion" is "the act of perverting," and the term "perverted" includes in its definition "misguided; distorted; misinterpreted" and "turned from what is considered right or true." *Id.* The definition of "taint" includes "a trace of something bad or offensive." *Id.* Pursuant to the definitions, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer.

> See also Perkins & Boyce, *supra,* 542 ("It is corrupt for an officer purposely to violate the duties of his office."). The corrupt intent needed to prove misconduct of office does not necessarily require an intent for one to profit for oneself. Thomas, *supra,* 461, n 6, 475 NW2d 288.
>
> Official misconduct does not necessarily involve money as do the crimes of bribery and extortion, but as a common-law offense is much more inclusive, misconduct in office is not limited to obtaining property from another, but is supported if there is an injury to the public or an individual. [67 CJS, Officers, § 256, p 790.]
>
> Thus, we find that there is no quid pro quo requirement. If the acts alleged against defendants demonstrate a tainted or perverse use of the powers and privileges granted them, or a perversion of the trust placed in them by the people of this state, who expect that law enforcement personnel overseeing inmates will do so in a manner that is fair and equitable, they are sufficient to sustain a charge of misconduct in office.
>
> In making our ruling, we note that we do not find any support for the proposition that the common-law offense of misconduct in office includes some kind of an element of quid pro quo and that the prosecution may not proceed unless there is proof that defendants acted because of the gifts given by the inmates or that the inmates gave gifts in order to receive favors from defendants." People v Coutu (on remand), 235 Mich App 695, 704-707; 599 NW2d 556 (1999).

In the case at bar, defendant utilized his marked patrol car, while on duty, in full uniform, as a location in which to engage in sexual activity. It is clear that **he owed a duty to the public** to be ready to respond to an emergency at a moments notice. Furthermore, even if there was no emergency to respond to, **he owed a duty to the public to be discharging his duties**, not having his personal pleasures met by way of a visit from Nicole along with its attendant act of fellatio. In order to allow Nicole to perform an act of fellatio, Nicole testified that: "He unbuckled his stuff, he did not pull them down. He just opened them." (57a). By having his gun belt unbuckled, his pants

unfastened, his zipper down and Nicole's mouth on his penis, **defendant Perkins was not out doing his duty by patrolling Bay County**. He was not immediately available to respond to an emergency call. Instead, he was allowing a 16 year old child to be present in his patrol car, parked in a remote area, performing a sexual act. Clearly this is misconduct in office!

Defendant-Appellee claimed that:

> "The act of fellatio in this case did not arise from Defendant's status as a deputy. The act of fellatio is not in any manner, shape or form dependent upon Defendant being a deputy. It is an act that can be performed by anyone who is not a deputy and performed on any male who is not a deputy. It could have been performed when he was off-duty. There is no evidence in this case that the act was performed as a *quid pro quo* in exchange for some favor that a sheriff's deputy could bestow by virtue of the power of his office. There is no evidence in this case of corrupt conduct which arose from the performance of Defendant deputy's official duties. The alleged conduct simply does not fall within the scope of the common law offense of misconduct in office."

The Circuit Judge in his ruling quashing the charges said:

> "Because defendant's sexual conduct with the victim on the date charged did not arise out of performance or exercise of his official duties as a deputy sheriff, and was not accomplished under color of his office, it did not constitute official misconduct. Considering the facts upon which the District Court acted, there was no justification or excuse for the District Court's ruling, and that ruling must be set aside as an abuse of discretion." (207a)

However, it is not the act of fellatio in and of itself that brings about the charge of misconduct in office. Plaintiff-Appellant agrees with Defendant-Appellee that if this had occurred when he was off-duty, misconduct in office charges would be inappropriate. **Rather, it is the fact that defendant caused (or at the very least allowed) the act of fellatio to be performed upon him at a time when he owed a**

duty to the citizens of Bay County to be patrolling the highways and byways of the county, and when he owed a duty to the citizens of Bay County to be available at a moments notice to respond to an emergency, that causes him to be liable for the charge of misconduct in office.

In his brief in support of his Motion to Quash, Defendant-Appellee also asserted: "The misconduct in office charge contemplates evidence of official corruption. There is no evidence of official corruption in this case."

However, as the quote from Coutu, above, points out:

> "Pursuant to the definitions, a corrupt intent can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer. See also Perkins & Boyce, *supra,* 542 ("It is corrupt for an officer purposely to violate the duties of his office."). The corrupt intent needed to prove misconduct of office does not necessarily require an intent for one to profit for oneself." Coutu (on remand), supra, 706-707.

Plaintiff-Appellant agreed with Defendant-Appellee that question of whether defendant Mark Perkins was a "public officer" for purposes of the misconduct in office charge is a legal issue to be determined *de novo*. However, once it is determined that he was a public officer, the remaining issues relate to the district judge's probable cause determination and must be reviewed on the basis of whether the district judge abused his discretion.

Based upon the discussion above, the Plaintiff-Appellant believes that defendant-appellee was a public officer, and that the district judge did not abuse his discretion in determining that there was probable cause to believe that he committed the charged offense of misconduct in office and the associated charge of felony-firearm.

RELIEF REQUESTED

Plaintiff-Appellant requests this Honorable Court reverse the decision of the court of appeals as it relates to the issues presented above. The People further request that this Honorable Court remand the case back to the district court for reinstatement of the criminal sexual conduct 1st degree and felony-firearms charges, and to the circuit court for reinstatement of the misconduct in office and felony-firearms charges.

Respectfully submitted,

Dated: June 21, 2002

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